No. 85-5915

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

BRENDA E. WRIGHT, GERALDINE H. BROUGHMAN, and SYLVIA P. CARTER individually and on behalf of all persons similarly situated

Petitioners

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. _____

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QUESTIONS PRESENTED

1. Does 42 U.S.C. §1983 authorize private enforcement of a federal entitlement only if a right of action can also be implied from the underlying federal statute?

2. Did Congress, by vesting HUD with general regulatory authority in the United States Housing Act of 1937, intend to foreclose private enforcement of the Act pursuant to §1983?

3. Does the Brooke Amendment to the Housing Act of 1937 vest public housing tenants with substantive rights of the sort which can be enforced under §1983?

4. Must the federal courts entertain, under federal question and commerce clause jurisdiction, a right of action upon a tenant lease which unavoidably raises a substantial federal issue under the Housing Act of 1937 and implementing regulations?

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The opinion entered by the Court of Appeals for the Fourth Circuit in No. 85-1068 (August 26, 1985) is published at 771 F.2d 833 (4th Cir. 1985), and included in the appendix at A1. The opinion and judgment of the District Court are published at 605 F. Supp. 532 (W.D. Va. 1984), and included in the appendix at A 15 and A25.

JURISDICTION

The judgment of the Court of Appeals was entered on August 26, 1985, and this petition filed within 90 days thereafter. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations central to the case are set forth in the appendix:

STATEMENT OF THE CASE AND INITIAL JURISDICTION

Petitioners are low-income tenants of public housing projects owned and operated by respondent City of Roanoke Redevelopment and Housing Authority ("the Authority"). They complain that the Authority has required its tenants to pay charges for electric utility service which are in violation of the rent limits imposed by Congress through the Brooke Amendment to the United States Housing Act of 1937, and implementing regulations of the United States Department of Housing and Urban Development (HUD).

The Authority's projects were built and are operated with subsidies under the Housing Act of 1937, 42 U.S.C. §1437 et seq. A critical portion of the Housing Act of 1937 is the Brooke Amendment, added in 1969, which limits the rent which can be charged low-income public housing tenants and subsidizes local public housing authorities ("PHAs") to cover the resulting deficit in operating costs. The relevant portion of the Brooke Amendment at 42 U.S.C. §1437a(a)(1) reads as follows:

> **(1) §1437a. Rental payments; definitions**
> (a) Dwelling units assisted under this Act shall be rented only to families who are lower income families at the time of their initial occupancy of such units. A family shall pay as rent for a dwelling unit assisted under this Act the highest of the following amounts, rounded to the nearest dollar:
> (1) 30 per centum of the family's monthly adjusted income....[1]

In the absence of careful definitions, PHAs could easily evade the Brooke Amendment limits by adding on a host of other charges for essential services to achieve the same effect as higher rents. To avoid this problem HUD has historically considered "rent" in the public housing program to include shelter cost plus a reasonable amount for utilities. See HUD Comment to proposed regulations, 49 Fed. Reg. 31400 (August 7, 1984). The net effect of HUD's regulatory scheme is that the percentage of income which a tenant is to pay a housing authority as rent includes a reasonable utility allowance. A housing authority can impose additional charges for "excessive" consumption. A charge for any part of a "reasonable utility allowance," however, violates the rent ceiling established by the Brooke Amendment. How, then, is a reasonable utility allowance to be calculated?

The answer was provided by HUD's regulations entitled

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[1]This is the present version of the Brooke Amendment, last amended by P.L. 97-35 effective 10/1/81. The previous version at §1437a(a) was worded differently and imposed a 25% rent limit. The change has no operative effect on this suit, since the Housing Authority has always maintained its rent levels at the highest percentage authorized.

"Tenant Allowances for Utilities," 24 C.F.R. §865.470-.482, promulgated at 45 Fed. Reg. 59505 (September 9, 1980) and effective for the period of this suit. The regulations imposed mandatory procedural and substantive requirements. Utility allowances were to be calculated on the basis of current consumption data (§865.476), subject to notice and tenant comment (§865.473), and revised whenever more than 25% of tenants in any category of units exceeded the allowances (§865.480(b)(1)). The allowances were to be set high enough so that they would meet the needs of 90% of the dwelling units of each type and size (§865.477).

The Housing Authority was duly notified of the regulation by HUD and encouraged to comply even before the January 28, 1981, deadline if possible. The Housing Authority did absolutely nothing to comply; it "deemed its existing procedures and allowances... as being in substantial compliance."[2] It did not make a recalculation on current usage, or review the data periodically to consider revisions. It did not offer an opportunity for tenant comment. It never attempted to meet the substantive standard of meeting the consumption needs of 90% of tenant families. Quite the contrary: it continued to surcharge almost all its tenants - 100% in some unit sizes - for excessive utility consumption. Over a two year portion of the period in question the Authority extracted $113,114.54 from 1100 tenant families in surcharges that were manifestly in defiance of the HUD regulations.

The tenants filed this suit against the Authority on December 8, 1982, in the District Court for the Western District of Virginia at Roanoke. Their complaint stated two claims: (1) a claim under 42 U.S.C. §1983 that the Authority was violating their rights under the Brooke Amendment and

[2]These facts are drawn from discovery responses which were made part of the record by the tenants' motion for partial summary judgment. While they have not been established by the courts below, they have not been put in genuine dispute by the Authority.

implementing regulations; and (2) a claim under the Authority's standard lease, paragraph 4 of which read:

> **Utilities:** Management Agent agrees to furnish at no charge to the Resident the following utilities as reasonably necessary: hot and cold water, gas for cooking, and electricity for lighting and general household appliances and heat at appropriate times of the year, and also range and refrigerator. Resident will be required to pay for all excess consumption of utilities above the monthly allocated amount as developed by the Authority and determined by the individual check meter servicing the lease unit. The schedule of allocations and charges for excess consumption is posted on the bulletin board of each Housing Development office. [Emphasis added].

The tenants sought injunctive relief and damages for themselves and a class.

Jurisdiction of the District Court was invoked under 28 U.S.C. §1331 (in that the claims raised federal questions under the Brooke Amendment and HUD regulations); 28 U.S.C. §1337 (in that the Brooke Amendment is an exercise of the power of Congress to regulate interstate commerce); and 28 U.S.C. §1343 (3) and (4) (in that the §1983 claim asserted a denial of civil rights). Pendant jurisdiction was pled over any state law issues.

A class was certified under R. 23(a), (b)(2) and (b)(3). A period of discovery and negotiation followed, and the Authority agreed to escrow the disputed surcharges. The Authority moved for judgment on the pleadings asserting that (1) tenants have no implied right of action to enforce the Brooke Amendment; (2) the Brooke Amendment creates no substantive rights enforceable through §1983; and (3) the tenants' failure to join HUD, an indispensable party, mandates dismissal. The tenants moved for partial summary judgment on their §1983 claim under the Brooke Amendment and regulations, and opposed the dismissal. While the motions were pending, HUD adopted new utilities regulations (24 C.F.R. §965.470, effective October 2, 1984) and the Authority revised its allowances effective January 2, 1985. The parties agree that the request for injunctive relief was mooted by this action, but the claim for recovery of past

improper charges through January 1, 1985, remained. The new regulations, while different in their procedural and substantive requirements, are similarly mandatory, so that the major legal issues on appeal will remain critically relevant.

The District Court treated the dismissal motion as one for summary judgment and dismissed the case. The District Court's opinion (A 15, 605 F.Supp. 532) accepted the invitation to find no implied right of action (A17-20) although the tenants had never urged that basis for their suit. The District Court then reasoned that if no right of action could be implied, no right enforceable under §1983 could exist (A23-24). Even if it did, then it was foreclosed from §1983 enforcement by Congress' grant of regulatory authority to HUD (A22-23). Finally, it dismissed the lease claim as a discretionary exercise of pendant jurisdiction over state law claims (A24, n. 9), despite the position of the tenants that the lease claim constituted an independent basis of federal question and commerce clause jurisdiction raising a substantial federal question.

On appeal the Court of Appeals for the Fourth Circuit affirmed. The opinion (A1, 771 F.2d 833) read that Court's previous decisions in Perry v. Housing Authority of the City of Charleston, 664 F.2d 1210 (1981) and Phelps v. Housing Authority of Woodruff, 742 F.2d 816 (1984) to say that Congress intended to foreclose private §1983 enforcement of any section of the Housing Act of 1937 (A9). Despite the attempt of a concurring judge to separate the framework of analysis (A10), the Court persisted in an implied right of action analysis under Cort v. Ash, 422 U.S. 66 (1975), characterizing that inquiry as "similar, if not perfectly congruent" to examination of §1983's exceptions (A8, n. 9). Finally, the Court upheld the dismissal of the lease claim as an exercise of discretion. Id.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW DIVESTS PUBLIC HOUSING TENANTS OF ANY MEANINGFUL FEDERAL RIGHTS AND PERMITS LOCAL DESTRUCTION OF THE ESSENTIAL CHARACTER OF THE LOW INCOME HOUSING PROGRAM.

Nationwide there are 1,270,761 units of public housing owned by 3,031 local public housing authorities[3] with over 3 million tenants in residence. This massive housing effort is a cooperative venture of local authorities with the federal government within the framework of the United States Housing Act of 1937, its subsequent amendments, and implementing regulations of the federal Department of Housing and Urban Development. Although management responsibility of PHAs is accompanied by some discretion, there are specific and mandatory requirements pertaining to the rights of tenants: for instance, lease provisions, grievance hearings, and - central to this case - limitations on rents and charges that can be imposed on tenants.

From its passage in 1969, the Brooke Amendment to the Housing Act of 1937 has limited the percentage of tenant income which can be charged as rent by a PHA; and in a companion funding provision, subsidized PHA operating costs to make the limitation feasible. Prior to the Brooke Amendment, and notwithstanding the general regulatory authority of HUD, "the neediest families were excluded from the public housing program," S. Rep No. 91-392, 91st Cong.; 1st Sess. (1969), reprinted in [1969] U.S. Code Cong. and Admin. News 1524, 1542. Recognizing that the cost of operating and maintaining public housing would be "too high for the very poor to bear," id., Congress authorized HUD (present 42 U.S.C. §1437g) to pay PHAs the difference between the costs of operation and the amounts collected as rent under the percentage ceiling. This combination of stick and

[3] HUD FY1986 Congressional Budget Justification, Exhibit to hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 99th Congress 1st Session, on "Dept. of HUD - Independent - Agencies appropriations for 1986," Part V, p. 231 (March 1985).

carrot has been fairly described as "the essential feature" and "the backbone" of the public housing program, Howard v. Pierce, 738 F.2d 722, 728, 730 (6th Cir. 1984).

The Brooke Amendment provides no explicit private judicial or administrative remedy for its enforcement, nor does it preclude any. HUD, while having a general responsibility to enforce federal requirements affecting PHAs, has not asserted exclusive enforcement authority,[4] nor has it provided any mechanism for tenants to invoke HUD's enforcement authority regarding Brooke violation. In comments on the 1984 revision of the utilities regulations, for instance, HUD disclaimed authority or intention to preclude tenant challenge to PHA utility allowances in state or federal court, 49 Fed. Reg. 31403 (August 7, 1984). The same comments note that tenants may not challenge the utility allowances through the administrative grievance process, 49 Fed. Reg. 31407. HUD itself has repeatedly taken the litigation position that it has neither the authority nor the capacity to protect tenants' interests by enforcing the Brooke Amendment.[5] In fact, HUD's enforcement posture is so relaxed that the Brooke limits are not even mentioned in the standard annual contributions contract entered with PHAs.

Despite the centrality of the Brooke Amendment to the public housing effort, its "unmistakeable focus" upon low income tenants, Howard v. Pierce, 738 F.2d at 726, and the limited

[4]The Fourth Circuit's aside that HUD "declined to intervene" in the present dispute because of its "intricate sifting and weighing process" (A6-7, n. 7) is the sheerest speculation. The tenants noted at argument that they had received no response whatsoever to their complaint to HUD. This certainly reflects no affirmative decision on HUD's part. Although HUD would not need to do any "intricate sifting and weighing" to see that the Authority had completely disregarded the utilities regulations, the more probable hypothesis is bureaucratic inertia.

[5]See e.g., Stone v. District of Columbia, No. 83-199 (D.C. Cir.) brief filed February 10, 1984 for Federal appellees Pierce and White, pp. 39-41; Brown v. Housing Authority of McCrae, No. 85-8186 (11th Cir.) brief filed July 15, 1985 for Samuel R. Pierce, Jr., Sect'y. of HUD, pp. 22-23.

discretion or interest of HUD, the Court of Appeals for the Fourth Circuit has now decided that only HUD, and not those tenants, may enforce the Amendment against a PHA which has been in clear and uncontested violation for years. The Fourth Circuit reached this result without any analysis of the Brooke Amendment or reference to its legislative history; without a shred of statutory language showing a Congressional intent to exclude private enforcement; and with no evidence of any administrative mechanism for tenants to raise the question with HUD. While purporting to apply established exceptions to §1983 liability, the decision below so muddles the analysis that the exceptions become unrecognizable (see II below). The result, however, is clear enough: tenant families may not sue the Authority to enforce the Brooke limitations no matter how thoroughly the "essential character" of public housing as established by Congress has been perverted by the Authority.

This result would be devastating enough were it limited to the Brooke Amendment. By unexplained expansion of its earlier decisions under the Housing Act of 1937, the Court of Appeals has decided that no federal tenant rights may be enforced by a public housing tenant under §1983 ("... a characteristic of the §1437 right is precisely that the plaintiffs are not to have the authority themselves to sue," A7). This means that not only Brooke Amendment rent limits, but also grievance mechanisms mandated by Congress (42 U.S.C. §1437d(k)) and lease provisions considered essential by Congress (42 U.S.C. §1437d(l)) are to be unenforceable by their sole or chief beneficiaries. As the facts of this case demonstrate, in the absence of a private enforcement mechanism there can no longer be any meaningful federal rights of public housing tenants.

Where there is a manifest Congressional intention to assure those tenants certain federal rights - and particularly where the rights are so critical to the very purpose of public housing - the federal courts should not so quickly abdicate their enforcement role to an administrative agency which spurns

the task. The decision below thoroughly merits this Court's review.

II. THE DECISION BELOW REDUCES THE AVAILABILITY OF THE §1983 REMEDY TO CASES WHERE A PRIVATE RIGHT OF ACTION CAN BE IMPLIED FROM A FEDERAL STATUTE.

The tenants in this action relied upon 42 U.S.C. §1983 to enforce their Brooke Amendment rights, under authority of Maine v. Thiboutot, 448 U.S. 1 (1980). Thiboutot recognized that while §1983 vests no substantive rights, it may be invoked to redress violations of federal law under color of state law. One recognized exception to this general rule was stated in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 28 (1981) (to be enforceable through §1983, the federal law in question must create substantive rights, privileges or immunities to be enforced - mere hortatory language in a statute does not). A second exception was noted in Middlesex City Sewage Auth. v. Nat'l Sea Clammers Ass'n., 453 U.S. 1, 20 (1981) ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate Congressional intent to preclude the remedy of suits under §1983"). These exceptions are straightforward and relatively narrow because "we should not lightly conclude that Congress intended to preclude reliance on section 1983," Smith v. Robinson, 468 U.S. _____, 104 S.Ct. 3457, 3459 (1984).

Neither of the exceptions to §1983 fits well in this case. The short of it is that the Pennhurst test (are there rights?) is well met by the strong entitlement language of the Brooke Amendment itself and the mandatory specifics of the utility regulations. The Sea Clammers test (is §1983 precluded by an alternative remedial scheme?) is well met by the absence of any statutory or administrative tenant remedy for PHA misconduct of this sort. The Court of Appeals forced a contrary solution only by shading its analysis into the tests for deciding whether courts should imply a cause of action from a federal statute, under Cort v. Ash, 422 U.S. 66 (1975). If

left to stand, the Fourth Circuit's opinion will not only muddle future applications of Cort v. Ash, Pennhurst, and Sea Clammers, but will essentially reduce the §1983 remedy for violations of federal law to those cases where it is not needed - where a right of action could be implied directly from the statute without use of §1983. This result essentially overrules Thiboutot.

This confusion is most evident in the opinion of the District Court, which read one of the Fourth Circuit's previous treatments of this issue to hold explicitly that no cause of action will lie under §1983 where no right of action may be implied from the substantive statute. A23-24, citing Home Health Services v. Currie, 706 F.2d 497, 498 (4th Cir. 1983). The Fourth Circuit opinion perpetuates this error in at least two respects. First, the panel persists in making a Cort v. Ash analysis (A8-9) although plaintiffs have consistently disclaimed any reliance on that approach. The analysis is nonetheless offered to render their disposition "more complete," id., as in Home Health Services, 706 F.2d at 498 and Phelps v. Housing Authority of Woodruff, 742 F.2d at 822, n. 10. In fact, such advisory opinions only confuse the issue, as the District Court's opinion demonstrates.

Second, the Fourth Circuit continues to minimize the difference between the implied rights analysis and the review of §1983 exceptions. "The inquiry under either interpretation of the appellant's position is similar, though not perfectly congruent." A9, quoting Phelps, supra. Even the concurring opinion, which tries to restore some distinction to the two analytic frameworks, emphasizes instead their similarity: "distinctions exist, however fine" (A11); "in many instances this would be a distinction without a difference" (A11); "the two are distinct, however subtly" (A14).

There are, of course, some parallels. Both Pennhurst and Cort v. Ash require a determination of whether a statute creates substantive rights in the plaintiffs. Both Sea Clammers

and Cort v. Ash require inquiry into Congressional intent to permit or preclude remedies. But in this case, as in very many cases, Congress has not explicitly spoken on the subject of private remedies. In that context, Sea Clammers and Cort v. Ash should produce dramatically different results. Unless there is an alternative private remedy in the statutory scheme, Sea Clammers would permit the customary private enforcement by §1983. A majority of this Court have characterized this as a "presumption that a federal statute creating federal rights may be enforced in a §1983 action."[6] Not so under Cort v. Ash, where absence of explicit Congressional intent simply moves the inquiry to other factors, with the burden upon the proponent of the implied right. Cannon v. University of Chicago, 441 U.S. at 677, 688 (1979). These are critical, not subtle, differences. Failure to recognize them inevitably has the effect, as in this case, of reducing the time-honored remedy of §1983 to a seldom-available redundancy. This is error demanding this Court's correction.

III. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SECOND, THIRD, SIXTH AND D.C. CIRCUITS CONCERNING THE AVAILABILITY OF §1983 TO ENFORCE FEDERAL HOUSING RIGHTS.

This decision of the Fourth Circuit holding §1983 to be unavailable for private enforcement of the Housing Act of 1937 is in conflict with at least four recent decisions of other circuits.

In Beckham v. New York City Housing Authority, 755 F.2d 1074 (2d Cir. 1984) the Second Circuit specifically held that public housing tenants could sue a housing authority under §1983 to enforce the Brooke Amendment. 755 F.2d at 1076-77. In examining the question of whether enforceable rights exist,

[6] Pennhurst, supra, 451 U.S. at 51 (White, Brennan and Marshall J.J., dissenting); Sea Clammers, supra, 453 U.S. at 27, A-11 (Stevens and Blackman, J.J., concurring in part and dissenting in part). See Boatowners and Tenants Ass'n. v. Port of Seattle, 716 F.2d 669, 674 (9th Cir. 1983).

the court found that "the rent limits set forth in the Brooke Amendment ... stand in sharp contrast to the funding statute interpreted in Pennhurst," id. at 1077, so that Brooke does create an enforceable right. Under the Sea Clammers test, the court found that the Brooke Amendment contained no comprehensive enforcement mechanism to enforce statutory rent limitations, in contrast to the elaborate remedial devices which showed a Congressional intent to foreclose the §1983 remedy in Sea Clammers. The Second Circuit's Beckham decision was urged below in this case, and the Fourth Circuit recognized the conflict; in a footnote (A10) that court simply asserted that Beckham must yield to the Fourth Circuit's own decisions.

The thorough decision of the District of Columbia Circuit in Samuels v. District of Columbia, 770 F.2d 184 (D.C. Cir., 1985) was brought to the attention of the Fourth Circuit after oral argument, but not discussed in the opinion despite an obvious conflict. The plaintiff public housing tenants in Samuels sued the District and its housing officials under §1983 to enforce another provision of the Housing Act of 1937, 42 U.S.C. §1437d(k) (requiring PHAs to maintain an administrative grievance procedure). The D.C. Circuit, like the Second Circuit in Beckham, found that the Housing Act of 1937 did not expressly establish or exclude any administrative or judicial remedy for violations of the grievance procedure requirement (770 F.2d at 196). The Samuels tenants also met the Pennhurst test for enforceable rights because Congress had explicitly mandated local PHAs to act in accordance with particular statutory standards (id. at 196-97). The HUD regulations on the subject were equally mandatory. While the Brooke Amendment in the present case is a separate provision from the grievance procedure requirement, the two provisions are similarly mandatory in their language and mutually lacking in statutory enforcement vehicles; they are both part of the Housing Act of 1937, and the Fourth Circuit's decision is in direct conflict as to the availability of §1983.

Also irreconciliable is the decision of the Sixth Circuit in Howard v. Pierce, 738 F.2d 722 (6th Cir. 1984). That tenant suit against HUD and local PHA did not rely on §1983; tenants rather sought to imply a right of action directly from the Brooke Amendment, an exercise that requires a substantially more affirmative demonstration of Congressional intent. After an intensive review of the function and legislative history of the Brooke Amendment, the court concluded that the Amendment places an "unmistakable focus" upon low income tenants, 738 F.2d at 726, and that implication of a private right of action against HUD was consistent with the lack of any private enforcement mechanism or explicit denial thereof, id. at 727-28. While in a different analytic framework from the Fourth Circuit's decision, this reasoning is flatly contradictory.

The Fourth Circuit's disposition of this case is also inconsistent, although less directly, with the Third Circuit's recent holding in Pietroniro v. Borough of Oceanport, 746 F.2d 976 (3d Cir. 1985). That court applied the Sea Clammers test to determine whether a business owner displaced by urban renewal was foreclosed from a §1983 suit to enforce federal relocation assistance remedies. Those remedies were available under the Housing Act of 1949 and related sources rather than the Housing Act of 1937, as in this case. The housing acts are similar, however, in the absence of any statutory scheme for private enforcement or comprehensive regulatory enforcement scheme; neither has a "mechanism by which the federal administrative enforcement authority charged with enforcing these conditions [on the state - HUD - can appropriately investigate and respond to the claims raised by persons in... [the position of the claimants]." 764 F.2d at 980. In finding §1983 an appropriate vehicle, Pietroniro rests upon a premise irreconcilable with the Fourth Circuit's position in this case.

Finally, the Court should be aware of two pending cases in the Eleventh Circuit. Brown v. Housing Authority of McRea, No. 85-8186; Nelson v. Greater Gadsden Housing Authority, No. 85-

7320. The availability of §1983 as a private remedy for Brooke Amendment utility violations is in issue in these appeals. Any decision on the merits will add to the conflict of authority on the question.

IV. THE DECISION BELOW REDUCES A SUBSTANTIAL PART OF FEDERAL QUESTION AND COMMERCE CLAUSE CASES TO DISCRETIONARY PENDANT JURISDICTION.

As their second claim in this case, the tenants asserted that the Authority's failure to provide adequate utility allowances violated the Authority's promise under paragraph 4 of the Authority's standard lease (p. 5 supra) to furnish electrical utilities service reasonably necessary for lighting and general household appliances. The District Court viewed this claim solely as an invocation of pendant jurisdiction, and in a footnote (A25, n. 9) dismissed the claim as a pendant state claim over which it had the discretion articulated in United Mine Workers v. Gibbs, 383 U.S. 715 (1966). The Court of Appeals affirmed this holding (A10). The sole inquiry of the court on this issue was whether the lease created a landlord-tenant relationship recognized in state law (A6). If so, then any suit was to be relegated to state court.[7]

This Court has recently formulated the federal question test in Franchise Tax Bd. of California v. Construction Laborers' Vacation Trust for Southern California, 463 U.S. 1, 13, (1983) as follows:

> Even though state law creates appellant's causes of action, its case might still "arise under" the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties.

Although the tenants' right to sue on their lease in this

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[7]The present tenants, of course, do not argue that all public housing lease questions arise under federal law; only that each case must be examined on its merits. Petitioners have no quarrel, for instance, with the Fourth Circuit's refusal to hear the lease claim in Perry v. Housing Authority of City of Charleston, supra, 664 F.2d at 1217-18.

case arises from state law, the substantive merits of the claim as pled in the complaint unavoidably include the federal issue. The meaning of "utilities... as reasonably necessary" cannot be legitimately determined apart from HUD's utilities regulations and the Brooke Amendment. It makes no sense to say that only a state court may decide questions of federal law so critical to the public housing program. Thus the District Court had independent bases in both §1331 and §1337 for jurisdiction over the lease claim, however it disposed of the §1983 claim. The rejection below of these mandatory grounds of jurisdiction was not only incorrect, but has striking implications.

The reasonable reading of the Fourth Circuit's decision is that it will accept federal question jurisdiction only if both the remedy - the cause of action - and the right are federal in nature. This result not only flies in the face of the Franchise Tax Board formulation, but also reduces to discretionary pendant jurisdiction, or excludes entirely from federal court, that substantial portion of contract cases where only the substantive right arises under federal law. Such cases have been properly within federal question jurisdiction as least since Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199-201 (1921). See generally 13 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE (1984) §3562, 41-48. Such a dramatic change in the business of the federal courts may not properly be accomplished without this Court's considered review.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Petition for a Writ of Certiorari was served by deposit in the United States mail, first class postage prepaid, addressed to Bayard E. Harris, Esq., counsel for respondent, Woods, Rogers & Hazelgrove, P. O. Box 720, Roanoke, Virginia 24004, on November 19, 1985.

Henry L. Woodward

Of Counsel for petitioners

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1068

Brenda E. Wright; Geraldine H. Broughman; Sylvia P. Carter; individually and on behalf of all persons similarly situated,

Appellants,

versus

City of Roanoke Redevelopment and Housing Authority,

Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Chief Judge. (CA 82-908)

Argued: June 6, 1985 Decided: August 26, 1985

Before WIDENER and MURNAGHAN, Circuit Judges, and GORDON, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

Henry L. Woodward (Renae Reed Patrick; Legal Aid Society of Roanoke Valley on brief) for Appellants; Bayard E. Harris (Woods, Rogers & Hazelgrove on brief) for Appellee.

MURNAGHAN, Circuit Judge:

Tenants of public low-cost housing brought an action against their landlord, the Roanoke Redevelopment and Housing Authority ("RRHA"). Their complaint was based on the alleged deprivation of the tenants' rights under the Brooke Amendment of the United States Housing Act of 1937, 42 U.S.C. § 1437(a),[1] and particular United States Housing and Urban Development ("HUD") regulations pertaining to utility allowances issued pursuant to that statute. Specifically, the tenant class alleged that the RRHA disregarded HUD regulations governing the establishment of "reasonable" electric utility allowances and the periodic revision of unreasonably low allowances. Thus, the tenants claimed that they were wrongfully overcharged for electrical consumption in excess of their designated allotments.[2]

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1 § 1437a. Rental payments

(a) Families included; amount

Dwelling units assisted under this chapter shall be rented only to families who are lower income families at the time of their initial occupancy of such units. Reviews of family income shall be made at least annually. A family shall pay as rent for a dwelling unit assisted under this chapter (other than a family assisted under section 1437f(o) of this title) the highest of the following amounts, rounded to the nearest dollar:

(1) 30 per centum of the family's monthly adjusted income;
(2) 10 per centum of the family's monthly income; or
(3) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

2 The appellants brought a second claim grounded on an alleged violation of a provision in the standard lease issued by RRHA. According to the tenants, RRHA's failure to furnish electrical utilities service reasonably necessary for lighting and general household appliances at no charge violated its obligation to tenants under Paragraph 4 of their standard lease. Paragraph 4 of the standard lease (Continued)

First, we must consider the correctness of the route which the plaintiffs sought to follow in their quest for injunctive and monetary relief,[3] namely, 42 U.S.C. § 1983.[4] It is now widely recognized that 42 U.S.C. § 1983 may be invoked to redress certain violations of federal statutory law by state actors. Maine v. Thiboutot 448 U.S. 1 (1980). Not all violations of federal law, however, give rise to § 1983 actions. In order to determine whether a violation of a particular federal statute constitutes a basis for § 1983 liability, a court must make two

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provides:

> **Utilities:** Management Agent agrees to furnish at no charge to the Resident the following utilities as reasonably necessary: hot and cold water, gas for cooking, and electricity for lighting and general household appliances and heat at appropriate times of the year, and also range and refrigerator. Resident will be required to pay for all excess consumption of utilities above the monthly allocated amount as developed by the Authority and determined by the individual check meter servicing the leased unit. The schedule of allocations and charges for excess consumption is posted on the bulletin board of each Housing Development office.

(Emphasis added).

3 The appellants initially sought injunctive relief requiring the RRHA to comply with the Brooke Amendment and federal regulations and a refund for all surcharges collected in violation of said law and regulations.

On appeal, however, the appellants stated that newly issued HUD regulations, 24 C.F.R. § 965.470-480 (1985) mooted their claim for injunctive relief and that only their claim for damages remained viable.

4 **§ 1983. Civil action for deprivation of rights**

> Every person who, under color of any statute ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

inquiries: 1) whether Congress had foreclosed private enforcement of the pertinent statute in the enactment itself, and 2) whether the statute at issue was the kind that created enforceable "rights" under § 1983. Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 19 (1981); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 28 (1981).[5]

We have recently ruled that violations of the Housing Act of 1937 do not give rise to a § 1983 cause of action. See Perry v. Housing Authority of City of Charleston, 664 F.2d 1210, 1217-1218 (1981); Phelps v. Housing Authority of Woodruff 742 F.2d 816, 820-822 (1984). In Perry, low income tenants brought an action for declaratory and injunctive relief and damages against the local housing authority. The tenants based their action on 42 U.S.C. § 1437[6] and on 42 U.S.C. § 1983. The tenants claimed that the landlord failed to keep the premises safe and clean as required by 42 U.S.C. § 1437. We ruled that although

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5 In other words, the right asserted must itself be created in such other federal statute, for 42 U.S.C. § 1983 provides only a remedy and does not itself create rights. See, e.g., Miener v. State of Missouri, 673 F.2d 969, 976 n.6 (8th Cir. 1982), cert denied, 459 U.S. 909, 916 (1982) ("Section 1983 is remedial in nature, and does not in itself provide for any rights, substantive or otherwise."); Birnbaum v. Trussell, 371 F.2d 672, 676 (2d Cir. 1966) ("Sec. 1983 . . . should be interpreted with sufficient liberality to fulfill its purpose of providing a federal remedy in a federal court in protection of a federal right.").

6 **§ 1437. Declaration of policy**

> It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income and, consistent with the objectives of this chapter, to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs. No person should be barred from serving on the board of directors or similar governing body of a local public housing agency because of his tenancy in a lower income housing project.

the tenants were intended beneficiaries of the Act, the benefit was not without limits. It did not include the right to sue for what Congress had conferred. That is to say, there was no implied private right of action under § 1437. "[T]he legislative history indicates no intention to create in the Housing Act a federal remedy in favor of tenants but does indicate quite clearly the intention to place control of and responsibility for these housing projects in the local Housing Authorities." Perry, supra, at 1213. We also rejected the tenants' argument that they had a cause of action pursuant to 42 U.S.C. § 1983 since the tenants had failed to indicate "any substantive provisions of the various housing acts which [gave] them a tangible right, privilege, or immunity." Id. at 1217. While we acknowledged that "the Act was designed to help low income families" we emphasized that "the actual assistance went not to the tenants, but to the states." Id. We therefore concluded that § 1437 did "not create any legally cognizable rights in tenants of programs funded under the housing statutes." Id. We noted though that our disposition of the tenants' § 1437 and § 1983 claims did not deprive the tenants of a remedy. "The lease between the plaintiffs and [the local housing authority] creates a landlord-tenant relationship. Plaintiff's rights are based on this lease and their remedy, if any, lies in the [State] courts." Id. at 1217-1218, n.15.

In Phelps, tenants challenged the legality of the local housing authority's policies regarding the admission of new tenants. The tenants claimed that such policies deprived them of their "right" to be selected under the tenant preference provisions outlined in the Act and that therefore they had a cause of action pursuant to § 1983. In evaluating the viability of the § 1983 action in light of Middlesex and Pennhurst, supra, we first considered whether Congress foreclosed private enforcement of the Housing Act in the enactment itself. On that score, we concluded:

> [A]lthough [the statutory sections in question] clearly manifest Congressional intent to benefit generally applicants who are involuntarily displaced or who occupy substandard housing, its chosen means of accomplishing that end is plainly that HUD, rather than private litigants, is to be the enforcer of the statutory directive. Apart from the obvious lack of any affirmative statutory language indicating a Congressional intention to allow private remedial suits, the statute is replete with indications of an intention to entrust HUD with the means and the responsibility for effective enforcement. The statutory scheme requires the Secretary to include in all Annual Contributions Contracts a requirement that public housing authorities adopt tenant selection criteria which include express preferences and a requirement that eligible applicants be notified of expected occupancy dates "insofar as . . . can be reasonably determined." Under the statute the Secretary performs extensive audits to verify the authorities' compliance with the conditions of the ACC, and HUD is authorized, as contract promisee, to enforce compliance by the most drastic possible means: termination of the federal subsidies under the contract. In sum, the whole of the legislative scheme, we think, indicates Congress's intention that HUD should continue to enforce required conditions by means of asserting its rights under the ACC, thereby intending "to foreclose private enforcement" of the requirements of the Housing Act.

Phelps, supra, 742 F.2d at 821 (emphasis added). In sum, the situation is very analogous to the one in which a trustee, not the cestui que trust, must bring suit. See, e.g., In Re Romano, 426 F. Supp. 1123, 1128 (N.D. Ill. 1977), modified, 618 F.2d 109 (1980) ("trustee is the only party who can sue a tenant for back rent even if the beneficiary has the right to the land's proceeds").[7]

As to the second Middlesex inquiry, i.e., whether the rights allegedly conferred by the preference and notice provisions were the kind of "rights" enforceable under § 1983, we

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7 It was not an act of caprice on the part of Congress to designate HUD the "enforcer" of the Housing Act. Rather, consolidating enforcement of the Act in a single governmental body was a practical legislative attempt to protect the limited resources available to the government. In other words, HUD can act as a screening body and focus its attention on those housing developments sorely needing attention without risking the depletion of funds available for redressing violations of the Housing Act.

It should be noted that, in the instant case, the tenants stated at oral argument that they asked HUD to confront RRHA with its alleged violations of the Brooke Amendment. Ac-

concluded that no such "rights" were involved. Phelps, supra, 742 F.2d at 821-822. We ruled that it was highly unlikely that Congress intended federal courts to "make the necessary balancing of inevitably conflicting interests as between different applicants and possibly opposing statutory purposes that would be required to adjudicate individual claims of right." Id. at 822. Likewise, in the instant case, we consider it highly unlikely that Congress intended federal courts to make the necessary computations regarding utility allowances that would be required to adjudicate individual claims of right.

To conclude, the plaintiffs under 42 U.S.C. § 1437(a) have certain rights but the remedy to enforce them is not conferred on them. Under 42 U.S.C. § 1983, conversely, the statute itself creates no right, but for rights elsewhere created of a certain character the statute provides a remedy. It will not suffice, however, simply to put the § 1437 right and the § 1983 remedy together to enable the case the plaintiffs assert to proceed. The § 1437 right is simply incompatible with the § 1983 remedy, for a characteristic of the § 1437 right is precisely that the plaintiffs are not to have the authority themselves to sue. HUD alone may, as quasi trustee, take legal action, for the right is explicitly tailored not to allow the beneficiaries, the low cost housing tenants, to do so.[8]

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cording to the tenants, HUD declined to intervene. HUD's decision presumably reflected an intricate economic "sifting and weighing" process in which it assessed the utility of proceeding further on the tenants' behalf. Since the tenants chose not to join HUD as a defendant, we need not look behind HUD's decision in order to determine whether it breached any duty--perhaps that of a "trustee" owed to low-cost housing tenants under the Act. Cf. Howard v. Pierce, 738 F.2d 722, 730 (6th Cir. 1984).

8 The tenants rely on McGhee v. Housing Authority of City of Lanett, 543 F. Supp. 607 (M.D. Ala. 1982) to support the proposition that a violation of the Brooke Amendment gives rise to a § 1983 cause of action. Such reliance is misplaced. In McGhee, a public housing tenant brought an action against public housing authorities for setting rent in excess of 1/4 of her income in violation of the Brooke Amendment. The tenant asserted a cause of action under both

(Continued)

Thus, in light of Perry and Phelps, supra, the action of the district judge in granting summary judgment in favor of the RRHA on the § 1983 action and in dismissing the claim based on the lease without prejudice to pursuit by the plaintiffs of any state court cause of action which they may be entitled to assert is affirmed.[9]

AFFIRMED.

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§ 1437(a) and § 1983. The district court held that no private right of action existed under the Brooke Amendment but that the tenant had a cause of action under § 1983. The court's analysis pertaining to the existence of a § 1983 claim was, however, by no means exhaustive. The district court, in concluding that a § 1983 action existed, merely cited Maine v. Thiboutot, 448 U.S. 1 (1980), for the proposition that "§ 1983 encompasses claims based on purely statutory violations of federal law" without engaging in the more detailed inquiry prescribed in Middlesex, supra. Thus, based on the district court's reasoning, any time a plaintiff could assert a violation of federal law, (s)he could establish a § 1983 cause of action regardless of whether Congress foreclosed private enforcement of the particular statute or whether the statute at issue failed to create the type of "rights" enforceable under § 1983. Maine v. Thiboutot, however, concerned a federally established right to social security benefits which clearly was enforceable by private action in a state court. That, of course, is very different a) from Brooke Amendment benefits which, for reasons already advanced, are not enforceable by private action and b) from rights to bring state court actions under state landlord and tenant law.

As for Beckham v. New York City Housing Authority, 755 F.2d 1074 (2d Cir. 1985), it must yield to the authority of Perry and Phelps, supra, from our own circuit.

9 We have also considered whether the statute relied on, namely, the Brooke Amendment of the United States Housing Act of 1937, 42 U.S.C. § 1437(a), created rights of the type which plaintiffs here assert. See Cort v. Ash, 422 U.S. 66 (1975). The tenants in the instant case never asserted a cause of action under the Brooke Amendment but rather limited their claim to § 1983. However, given the close nexus between implying a cause of action under a federal statute and asserting a § 1983 claim, we address the former in order to render our disposition of the case more "complete." See Phelps v. Housing Authority of Woodruff, 742 F.2d 816, 822, n.10 (4th Cir. 1984):

> Appellants argue that the district court erred in holding that 42 U.S.C. § 1437d(c)(4)(A) and 42 U.S.C. § 1437d(c)(3)(ii) do not give rise to implied private causes of action. It is somewhat unclear whether they make this argument only in response to the district court's holding that in order for a violation of a federal statute to be actionable under § 1983, that statute must be of such a quality

(Continued)

that in essence it gives rise to such an implied action, or whether they suggest that they had asserted such a separate private right of action that was erroneously denied.

As both the complaint and the court's opinion are cast in § 1983 terms, we consider the former interpretation more plausible. The inquiry under either interpretation of the appellant's position is similar, though not perfectly congruent. Nevertheless, lest our disposition of the case seem incomplete, we reject plaintiffs' implied private cause of action argument on the reasoning of Perry v. Housing Authority, 664 F.2d 1210 (4th Cir. 1981).

(Emphasis added).

Review of the statutory language of the Brooke Amendment reveals no provisions creating a right on the part of individual tenants to assert infractions of the sort claimed here. The existence of such a right is essentially negatived by the provisions of the annual contributions contract, a standardized form employed by HUD in this case. By Section 508 the annual contributions contract provides that HUD has "the right . . . to maintain any and all actions at law or in equity against the local authority to enforce the correction of any . . . default or to enjoin any . . . default or breach." The implication to be drawn from that language runs counter to the claim that the plaintiffs have enforceable rights under the Brooke Amendment.

GORDON, Senior District Judge, Concurring:

I concur in the analysis and the result of the panel's opinion. I write this brief concurrence to emphasize and, I hope, to clarify a point upon which the precedent has become a bit unclear, and which I found troubling. In considering the briefs, oral arguments, and the district court's decision in this case, it became apparent that the proper §1983 analysis has become mistakenly entangled with the analysis for an implied private right of action. While the two analyses are closely related, they are separate and distinct. My purpose is to disentangle them.

As discussed in the panel's opinion, Perry v. Housing Authority of Charleston, 664 F.2d 1210 (4th Cir. 1981), and Phelps v. Housing Authority of Woodruff, 742 F.2d 816 (4th Cir. 1984), are the controlling precedent on the issue presented in this case, that is, whether a §1983 cause of action exists to enforce the Brooke Amendment to the Housing Act of 1937. In each case, this court applied the standards set forth in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), and Middlesex City Sewage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981), for determining whether §1983 enforcement of a statutory violation was proper. See Maine v. Thiboutot, 448 U.S. 1 (1980). The dual tests for §1983 enforcement are 1) whether Congress, in enacting the statute and its enforcement scheme, had foreclosed a private remedy, and 2) whether the statute created enforceable "rights, privileges, or immunities" under §1983. Middlesex, 453 U.S. at 19; Pennhurst, 451 U.S. at 28, n. 21.

In Perry the aggrieved tenants sought relief under §1983 and also alleged a private right of action under the Housing Act of 1937 (Act). The Perry court began its analysis by determining whether the tenants had a private right of action under the Act.

To do this, the court applied the test of Cort v. Ash, 422 U.S. 66 (1975):

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And [fourth], is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal laws?

Perry, 664 F.2d at 1211-12 (quoting Cort v. Ash, 422 U.S. at 78).

It is clear that many of the elements that a court must consider in applying Cort v. Ash would also be relevant in determining whether a §1983 action was proper under Middlesex and Pennhurst. Both tests hinge on whether "rights" were created in the prospective plaintiffs and whether Congress intended private enforcement by the respective procedure. Distinctions exist, though, however fine. For instance, Cort v. Ash instructs us to consider whether there is "any indication of legislative intent . . . either to create [a private] remedy or to deny one," and to ask whether it would be consistent with the underlying purpose to imply one, 422 U.S. at 78; Middlesex commands that we ask "whether Congress had foreclosed private enforcement of that statute in the enactment itself." 453 U.S. at 19. Under the former, we must find an intention to imply a remedy before granting one; under the latter, if there is a "right," we assume that private enforcement is permissible absent some clear indication to the contrary. While in many instances this would be a distinction without a difference, it did not prevent the Supreme Court in Middlesex from addressing the questions separately.[1]

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1. The Court was faced with whether a private right of action existed to enforce certain federal pollution control and environmental protection acts. The Court stated that "both the structure of the Acts and their legislative history lead us to conclude that Congress intended that private remedies in addition to those expressly provided should not be implied." 453 U.S. at 18 (applying Cort v. Ash). The Court then applied the test for §1983 and, based on these same factors, concluded that "the existence of . . . express remedies [in the statutes] demonstrate not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under §1983." Id. at 21.

The Perry court first addressed whether the tenants could pursue a private right of action under the Act, and applied Cort v. Ash. Because the sections of the Act relied on by the plaintiffs in Perry were merely broad policy provisions, and because HUD was the intended enforcer of the Act, the court concluded that there were no "rights" created and no intent to imply a private remedy. The court therefore refused to imply a private right of action. Turning to whether the tenants could sue under §1983, the Perry court focused on the second prong of the Middlesex test: whether the statute created privately enforceable "rights." Based partly on the same factors the court had considered in its Cort v. Ash discussion, the Perry court concluded that the Act "does not create any legally cognizable rights in tenants of programs funded under the housing statutes." 664 F.2d at 1217. Because it had answered this inquiry in the negative, the court never reached the issue of legislative intent to foreclose §1983 enforcement.

Subsequently, in Home Health Services v. Currie, 706 F.2d 497 (4th Cir. 1983) (per curiam), this court was faced with a claim alleging a private right of action under the Medicare Act. The court applied Cort v. Ash and concluded that no such private right of enforcement existed. The court noted that, although a §1983 claim had not been raised at trial, one had been argued on appeal. Assuming, arguendo, that the issue was properly before it, the court stated that "the conclusion that Home Health has no right of action [under this statute] compels the conclusion that Home Health likewise has no cause of action under §1983. . . ." Id. at 498 (citing Perry, 664 F.2d at 1217-18). Read in context,

this language means "as in Perry, we find that based upon the same elements which lead us to conclude that no private right of action exists under Cort v. Ash, we conclude that there is no §1983 right under Middlesex." Taken out of context, however, it could imply, incorrectly, that application of the Cort v. Ash test suffices to answer the §1983 inquiry as well, i.e., that the conclusion that there is no private right of action leads inexorably to dismissing a §1983 action.

The potential for misinterpreting this language may have been foreshadowed in Phelps v. Housing Authority, 742 F.2d 816 (4th Cir. 1984). In Phelps, as in Perry, the plaintiffs attempted to sue under the broad policy provisions of the Housing Act, but, unlike the Perry plaintiffs, the tenants urged their claim solely under §1983. Applying Pennhurst, Middlesex, and Perry, the court in Phelps concluded that a §1983 action was not proper. In a footnote, the court noted:

> Appellants argue that the district court erred in holding tha 42 U.S.C. §1437d(c)(4)(A) and 42 U.S.C. §1437d(c)(3)(ii) do not give rise to implied private causes of action. It is somewhat unclear whether they make this argument only in response to the district court's holding that in order for a violation of a federal statute to be actionable under §1983, that statute must be of such a quality that in essence it gives rise to such an implied action, or whether they suggest that they had asserted such a private right of action that was erroneously denied.
>
> As both the complaint and the court's opinion are cast in §1983 terms, we consider the former interpretation more plausible. The inquiry under either interpretation of the appellant's position is similar, if not perfectly congruent. Nevertheless, lest our disposition of the case seem incomplete, we reject plaintiffs' implied private cause of action argument on the reasoning of [Perry].

742 F.2d at 822, n. 10 (emphasis added).

The subject case was brought exclusively under §1983. In its Memorandum Opinion, the district court quoted from Home Health the dictum that "the conclusion that Home Health has no

right of action . . . under 42 U.S.C. §1359a compels the conclusion that Home Health likewise has no cause of action under §1983. . . ." Thus, the district court concluded that "a determination of whether the plaintiffs have been deprived of 'rights, privileges, or immunities' within the meaning of §1983 should begin with a determination of whether an implied right of action exists under the Brooke Amendment." Wright v. City of Roanoke Redevelopment and Housing Authority, No. 82-0908, Slip Op. at 3 (W.D.W.Va. Dec. 21, 1984). The court proceeded to apply Cort v. Ash, and found no private right of action. The district court then discussed Middlesex, but in the final analysis, the court decided that plaintiffs could not bring their action under §1983 based on its conclusion that no private right of action existed, plus the "compels" language of Home Health. Slip Op. at 11. This seems to represent a misinterpretation of Home Health and a confusion of the appropriate analysis for these two distinct remedial devices.

It is clear from Perry, Phelps, and from this court's opinion today that the correct inquiry to determine whether a §1983 action is proper is set forth in Pennhurst and Middlesex. While any confusion is understandable, it was unnecessary and inappropriate to consider Cort v. Ash and its progeny in the subject case. Although the §1983 analysis closely parallels the Cort v. Ash inquiry for implied private rights of action, the two are distinct, however subtly. It is only to emphasize this distinction that I felt compelled to add my voice to the opinion of this court, for I concur fully in its opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

BRENDA E. WRIGHT, et al.,
Plaintiffs,

vs.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY,
Defendant

Civil Action No. 82-0908

MEMORANDUM OPINION

By: James C. Turk
Chief District Judge

On December 8, 1982, Plaintiffs, who are tenants of public low-cost housing, filed suit in this court against their landlord, the City of Roanoke Redevelopment and Housing Authority[1] ("RRHA"). In their complaint, Plaintiffs alleged that RRHA violated the Brooke Amendment of the United States Housing Act of 1937, 42 U.S.C. § 1437(a) (1983), and its implementing regulations, 24 C.F.R. §§ 865.470-.482 (1983), in that it had set the utility allowances unreasonably low and failed to revise them, so that RRHA might collect greater excess consumption surcharges from the majority of tenants. They also claimed that RRHA had disregarded federal law prescribing how such allowances are to be maintained. The Brooke Amendment provides that public housing tenants be charged no more than twenty-five to thirty percent of their adjusted income for rent, which by definition includes an established amount of

1. On August 10, 1983, this action was certified as a class action, the class being comprised of tenant families in seven projects of public housing in the City of Roanoke.

utilities.[2] Plaintiffs based their claims for relief upon 42 U.S.C. § 1983 and the lease contracts between Plaintiffs and Defendant RRHA.

On May 14, 1984, Defendant RRHA moved for judgment on the pleadings, pursuant to Rules 12(c) and (h)(2) of the Federal Rules of Civil Procedure. In its motion, RRHA challenges the legal sufficiency of plaintiffs' cause of action. RRHA asserts that: 1) the plaintiffs have no private right of action under the Brooke Amendment and that enforcement depends solely on the action of the United States Department of Housing and Urban Development ("HUD"), 2) the Housing Act does not create any substantive rights which would allow the plaintiffs to proceed under § 1983, and 3) HUD is an indispensable party to the action and the plaintiffs' failure to join it mandates dismissal. Since matters outside the pleadings have been submitted to and considered by this court, the defendant's motion shall be treated as one for summary judgment and disposed of in accordance with Rule 56 of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 12(c), 56.

I.

INTRODUCTION

In Home Health Services, Inc. v. Currie, 706 F.2d 497 (4th Cir. 1983), a provider of home health services brought suit against a physician and the state medical university for alleged violations of the Medicare Act, 42 U.S.C. § 1395a (1983),

2. Gross rent is the amount of rent chargeable to a tenant for the use of the dwelling accommodation, equipment, ... services, and Utilities not to exceed the Allowances for PHA-Furnished Utilities.... 24 C.F.R. § 865.472. Allowances for Public Housing Authority ("PHA")-Furnished Utilities represent the maximum consumption units (e.g. kilowatt hours of electricity) which may be used by a dwelling unit without a surcharge for excess consumption against the tenant. 24 C.F.R. § 470.

and federal civil rights statutes. The Fourth Circuit Court of Appeals found that Home Health had no implied right of action under the Medicare Act, and went on to state that "the conclusion that Home Health has no right of action ... under 42 U.S.C. § 1359a compels the conclusion that Home Health likewise has no cause of action under §§ 1983 and 1985." Home Health, 706 F.2d at 498.[3] Thus this court feels that under the Fourth Circuit's analysis, a determination of whether the plaintiffs have been deprived of "rights, privileges, or immunities" within the meaning of § 1983[4] should begin with a determination of whether an implied right of action exists under the Brooke Amendment.

II.

PRIVATE RIGHT OF ACTION UNDER THE BROOKE AMENDMENT

In determining whether a private right of action may be implied from a statute when legislation does not provide expressly for such a remedy, a court must focus on congressional intent. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 377 (1982). Since 1975, the prevailing standard for determining whether Congress intended to imply such a right of action is that set forth in Cort v. Ash:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" ... that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? ... Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?... And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal laws?

422 U.S. 66, 78 (1975)(citations omitted). Although later cases favored a somewhat different but related approach, see, e.g., Transamerica Mortgage Advisor, Inc. (TAMA) v. Lewis, 444 U.S. 11, 15-16 (1979); Touche Ross & Co. v. Reddington, 442 U.S. 560, 568 (1979), the Supreme Court has recently reaffirmed the use of the Cort analysis. Daily Income, Inc. v. Fox, 104 S.Ct. 831, 839 (1984).

The first inquiry under Cort is whether Congress intended to create a special class of beneficiaries which includes the plaintiffs, and, if so, whether Congress intended to confer federal rights upon such beneficiaries. In construing sections 1437(c) and 1441, two general policy sections of the Housing Act, the Fourth Circuit Court of Appeals determined that: "First, the purpose of the legislation was to help the states; second, the purpose in helping the states was ultimately to benefit low income families. Thus the legislation had two beneficiaries-states as direct beneficiaries and low-income families as indirect beneficiaries." Perry v. Housing Authority of City of Charleston, 664 F.2d 1210, 1213 (4th Cir. 1981). The Perry court also found that "[t]here is clearly no indication in the legislation or in [the] history [of the Housing Act] that Congress intended to create in public housing tenants a federal right of action against their municipal landlords." Id.

The court, combining factors three and four of the Cort analysis, determined that:

> it would plainly be inconsistent with any legislative scheme in the federal legislation to imply a private cause of action where the

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3. The Fourth Circuit cited Perry v. Housing Authority of City of Charleston, 664 F.2d 1210, 1217 18 (4th Cir. 1981) as standing for this conclusion.

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4. 42 U.S.C. § 1983 provides, in relevant part, that:
> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> legal right involved is one traditionally left to state law. It would be hard to find an area of the law in which the states have a greater interest or have had greater involvement than in the legal area of landlord-tenant.

Id. at 1216. Thus, the court held that there was no implied cause of action under the Housing Act against a local housing authority.

In applying the Cort analysis to the provisions of the Brooke Amendment, this court sees no reason to deviate from the conclusuons reached by the Fourth Circuit in Perry. The Brooke Amendment provided, at the time this suit was filed:

> (a) Dwelling units assisted under this Act shall be rented only to families who are lower income families at the time of their initial occupancy of such units. A family shall pay as rent for a dwelling unit assisted under this Act the highest of the following amounts, rounded to the nearest dollar:
>
> 1) 30 per centum of the family's monthly adjusted income;
> 2) 10 per centum of the family's monthly income; or
> 3) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payment which is so designated.

42 U.S.C. § 1437a(a) (1983). This relevant portion of the Brooke Amendment sets a limit on rent chargeable to tenants of low income housing. By definition, this rent includes utilities in an amount not to exceed that set by the Housing Authority, 24 C.F.R. §§ 860.403(a), 865.472 (1983), and approved by HUD. 24 C.F.R. § 865.473 (1983). The Brooke Amendment provisions apply only to lower income families who rent "dwelling units assisted under [the United States Housing] Act [of 1937]." 42 U.S.C. § 1437a(a) (1983)(emphasis added). Plaintiffs concede that the Housing Authority operates "its projects with federal subsidy

pursuant to an Annual Contribution Contract"[5] from HUD, and that "HUD retains general enforcement authority." Plaintiffs' Brief in Support of Summary Judgment p. 3, 18. Thus, although low income families are certainly one of the beneficiaries of the Brooke Amendment, they are not the only beneficiaries. Consistent with the other provisions of the Housing Act, "the legislation had two beneficiaries - states as direct beneficiaries and low-income families as indirect beneficiaries." Perry, 664 F.2d at 1213.

Although finding that an implied right of action existed under the Brooke Amendment against HUD, the United States Court of Appeals for the Sixth Circuit, in Howard v. Pierce, 738 F.2d 722 (6th Cir. 1984), "could discern no justifiction for extending such a cause of action to a public housing agency...." Id. at 730. In so holding, the Sixth Circuit, applying the second Cort factor, found that "nowhere in the legislative history... [was there] an expression of intent either to provide or deny a private means of enforcing the Brooke Amendment." Id. at 727. As the Fourth Circuit determined in Perry, "Congress need not fear that unless it specifically denies a cause of action, the courts will automatically imply one; when Congress is silent there is no presumption in favor of a legislatively created cause of action." Perry, 664 F.2d at 1213. Thus, under the Cort analysis, this court holds that there exists no implied right of action under the Brooke Amendment against a public housing authority such as RRHC.[6]

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5. Annual Contributions Contract ("ACC")

> A contract (in the form prescribed by HUD) for loans and annual contributions whereby HUD agrees to provide financial assistance and the PHA agrees to comply with HUD requirements for the development and operation of a public housing project.

24 C.F.R. § 841.103 (1983).

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6. Other courts have reached a similar conclusion. See Howard v. Pierce, 738 F.2d 722 (6th Cir. 1984); McGhee v. Housing Authority of City of Lanett, 543 F.Supp. 607 (M.D. Ala. 1982); Jackson v. Housing Authority of City of Fort Myers, No. 82-136-CIV-A.N.-17 (M.D. Fla. April 4, 1984).

III.

CAUSE OF ACTION UNDER 42 U.S.C. § 1983

42 U.S.C. § 1983 provides for the redress of deprivations of rights secured by the United States Constitution or statutes under color of state law. Though there is no constitutional right to the housing involved here and thus no constitutional violation, Lindsey v. Normet, 405 U.S. 56, 74 (1972), the Supreme Court has recognized that a § 1983 action may be based solely upon a violation of a federal statutory right. Maine v. Thiboutot, 448 U.S. 1 (1980). In order to prevail under a purely statutory-based § 1983 claim, however, the court must determine "[f]irst, whether Congress, in enacting the statute, manifested in the statute itself an intent to foreclose its private enforcement [and] [s]econd, whether the statute is of a kind aimed at creating enforceable 'rights' under § 1983." Phelps v. Housing Authority of Woodruff, 742 F.2d 816, 820 (4th Cir. 1984); Middlesex City Sewage Authority v. National Sea Clammers Association, 453 U.S. 1, 17, 20 (1981). Failing either of these, there can be no cause of action under § 1983. Pennhurst State School and Hospital v. Halderman, 451 U.S. at (1981).

An analysis of the language of the statute itself shows that there is no explicit denial of private enforcement; however, this court is of the opinion that Congress has evinced, in the implementing regulations of the Brooke Amendment, an intent to foreclose private enforcement. The implementing regulations provide two means by which utilities may be provided: PHA-Furnished Utilities and Tenant Purchased Utilities.

> Allowances for PHA-Furnished Utilities represent the maximum consumption units (e.g., kilowatt hours of electricity), which may be used by a dwelling unit without a surcharge for excess consumption against the tenant. Allowances for Tenant-Purchased Utilities represent fixed dollar amounts which are deducted from the Gross Rent otherwise chargeable to a tenant who pays the actual Utility charges directly to the Utility suppliers whether they be more of [sic] less than the amounts of the Allowances.

24 C.F.R. § 865.470 (1983). These regulations provide for relief from excess charges of both PHA-Furnished and Tenant Purchased Utilities where a possible defect in the utility meter or error in the meter reading is involved, and in the case of PHA-Furnished utilities, if there is a defect in the dwelling. 24 C.F.R. § 865.481(a)(1),(a)(2) (1983). However, requests for relief from excess consumption on the grounds "that the utility consumption exceeds the applicable Allowance by 20 percent or more for reasons other than wasteful or unauthorized usage" are permitted "[i]n the case of Tenant-Purchased utilities only." 24 C.F.R. § 865.481(a)(3) (1983). Since the HUD regulations permit such requests for relief to be submitted to the PHA solely in the case of Tenant-Purchased Utilities, it is clear that such requests are foreclosed in a case such as this involving PHA-Furnished Utilities. Because Congress has "manifested an intent" to foreclose private enforcement, the plaintiffs have no enforceable rights within the meaning of section 1983 against a public housing authority such as RRHC.

Secondly, although the Brooke Amendment clearly manifests congressional intent to benefit generally tenants of public housing, its chosen means of accomplishing that end is for HUD, rather than the tenants themselves, to enforce the statutory requirements. RRHA operates its projects with federal subsidies pursuant to an Annual Contributions Contract ["ACC"] "whereby HUD agrees to provide financial assistance and [RRHA] agrees to comply with HUD requirements for the development and operation of a public housing project." 24 C.F.R. § 841.103.[7] Plaintiffs

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7. Section 5(1) of the Annual Contributions Contract between HUD and RRHA also provides that "[t]he Local Authority shall. . . operate all Projects covered by this Contract in compliance with all provisions of Contract and all applicable provisions of the [United States Housing] Act [of 1937]. . . ." Section 311 allows HUD to inspect and to audit all the books, documents, papers, and records of the Local Authority that are pertinent to its operations with respect to financial assistance under the Act.

allege that RRHA has failed to follow federal law prescribing how utility allowances are to be set and maintained. If RRHA has indeed breached any of the conditions of the Annual Contributions Contract, HUD has "the right... to maintain any and all actions at law or in equity against the Local Authority to enforce the correction of any such default or to enjoin any such default or breach." HUD Annual Contributions Contract §508. "In sum, the whole of the legislative scheme ... indicates Congress's intention that HUD should continue to enforce required conditions by means of asserting its rights under the ACC, thereby intending 'to foreclose private enforcement' of the requirements of the Housing Act." Phelps v. Housing Authority of Woodruff, 742 F.2d 816, 821 (4th Cir. 1984).

Even where the implementing regulations of the Brooke Amendment and the provisions of the ACC found not to foreclose private enforcement, the Fourth Circuit Court of Appeals has determined that in order for a violation of a federal statute to create "rights, privileges, or immunities" within the meaning of § 1983, it must at the least be of a kind that gives rise to an implied cause of action. In Perry, the court determined that the Housing Act did not create rights enforceable in private actions under § 1983. Although it could be argued that the provisions involved here are more specific than those in Perry and thus create such enforceable rights, this court must reject such a narrow interpretation of Perry in view of the fact that the Court of Appeals did not specifically limit its ruling to the provisions involved.[8] If there were any doubt as to the

8. In Phelps, the Fourth Circuit Court of Appeals also declined to limit its holding in Perry, when it stated that "[a]lthough it might be argued that Perry is distinguishable, since the preference and notice rights [here] are more specific ... we are not persuaded that this distinction is of sufficient moment to alter our conclusion that the defendants' actions did not deprive the plaintiffs of any 'rights secured by the ... laws of the United States.'"

principle enunciated in Perry, it was dispelled by the holding in Home Health that "the conclusion that Home Health has no [implied] right of action... under 42 U.S.C. § 1395a compels the conclusion that Home Health likewise has no cause of action under §§ 1983 and 1985." Home Health, 706 F.2d at 498. (emphasis added).

Because this court finds that the plaintiffs have failed to state a cause of action under 42 U.S.C. § 1983,[9] the defendant's Motion for Summary Judgment must be GRANTED. Each side shall bear its own taxable costs. An accompanying order shall be entered this day.

The Clerk of Court is directed to send certified copies of this opinion to counsel of record.

DATED: This 21st day of December 1984.

Chief U. S. District Judge

A TRUE COPY, TESTE:
Joyce F. [illegible], Clerk
By: [signature]
Deputy Clerk

9. Since this court finds that the plaintiffs have failed to state a claim under § 1983, it is unnecessary to determine whether HUD is an indispensable party to the action. This court also dismisses the plaintiffs' cause of action based on the defendant's alleged breach of its lease agreements with the plaintiffs, under the doctrine of pendant jurisdiction as set forth in United Mine Workers v. Gibbs, 383 U.S. 715 (1966)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

BRENDA E. WRIGHT, et al., Plaintiffs,	)	CIVIL ACTION NO. 82-0908
vs.	)	ORDER
CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY, Defendant	)	BY: James C. Turk, Chief District Judge

In accordance with the Court's Memorandum Opinion filed this day, it is hereby

ORDERED

that the defendant's Motion for Summary Judgment shall be, and hereby is, GRANTED.

The Clerk of Court is directed to send certified copies of this Order to counsel of record.

ENTER: This 21st day of December, 1984.

Chief U. S. District Judge

A TRUE COPY, Teste:
Joyce F. Witt, Clerk
By: Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

BRENDA E. WRIGHT, et al., etc., Plaintiffs	)	
v.	)	CONSENT ORDER ON CLASS CERTIFICATION AND NOTICE
CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY, Defendant	)	Civil Action No. 82-908

This case was brought as a class action under Rule 23(a) and (b)(2) and (b)(3) of the Federal Rules of Civil Procedure. The parties have represented to the court that they have agreed upon the procedure by which the case shall go forward as a class action, and their agreement is reflected in this order and the incorporated notice.

The court confirms that upon the allegations of the complaint, the case is properly maintained as a class action under the requirements of Rule 23(a), (b)(2) and (b)(3). The action would appear to affect over 1000 tenant families in seven projects of public housing in the City of Roanoke. Issues of law and fact concerning the City of Roanoke Redevelopment and Housing Authority's ("the Authority's") standard lease and utility policy are common to all tenants. The claims of the representative parties appear to be those which might be raised by any other tenant family, and no antagonistic interest is apparent. The representative parties appear situated to fairly and adequately protect the interests of the class, and are represented by counsel familiar with class civil rights claims. The Authority policy and practices here challenged appear to be generally applicable to all tenant families in seven projects, making class declaratory and injunctive relief under (b)(2) appropriate for consideration. Finally, it appears that the common questions about Authority policy and practices predominate over individual computation issues, making a class action under (b)(3) the superior method for fair and efficient adjudication of the controversy.

Accordingly, it is ORDERED that:

1. The case is certified as a class action pursuant to Rule 23(a) and (b)(2) and (b)(3).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

NOTICE

Certain persons have brought a suit against the City of Roanoke Redevelopment and Housing Authority. The persons who have brought this suit are referred to as the plaintiffs. The United States District Court has certified the action as a class action which means that the plaintiffs may represent not only themselves but also any person who is a member of the class which the court has defined. The court has defined the class as all tenants of Landsdowne Park, Lincoln Terrace, Hurt Park, Hunt Manor, Jamestown Place, Bluestone Park, and Indian Rock Village who have been, or will be during the course of litigation, surcharged for consumption of electric utility service in excess of allowances established by the City of Roanoke Redevelopment and Housing Authority. The class includes all those affected retroactively to January 7, 1981.

The plaintiffs are asking the court to do the following things:

1. Decide that the way the City of Roanoke Housing Authority determines and collects charges for the use of excess electricity is in violation of federal law and the tenants' leases;

2. Require the City of Roanoke Housing Authority to calculate in accordance with law all future charges for excess electricity use;

3. Require the City of Roanoke Housing Authority to refund to the members of the class any excess electricity charges it has collected from them.

The City of Roanoke Redevelopment and Housing Authority denies that any surcharge in violation of law has been collected and denies that any refund is owed to members of the class.

The purpose of this notice is to tell you about the lawsuit so that you can decide whether you wish to remain a member of the

2. The class is defined as all tenants of Landsdowne Park, Lincoln Terrace, Hurt Park, Hunt Manor, Jamestown Place, Bluestone Park and Indian Rock Village who have been, or will be during the course of litigation, surcharged for consumption of electric utility service in excess of allowances established by the City of Roanoke Redevelopment and Housing Authority. This class includes all those affected retroactively to January 7, 1981.

3. Notice shall be given to class members in the form attached to this order. The court finds that the best notice practicable under the circumstances is individual notice to all present tenants of the specified projects of the defendant Housing Authority and notice by publication designed to reach those persons who were tenants in the specified projects and paid a utility surcharge subsequent to January 7, 1981, but who have since terminated their tenancy. The notice to the present tenants shall be printed at the expense of plaintiffs and mailed by defendant Housing Authority in the same envelopes as rental notices for the first month practicable following entry of this order. Defendant's counsel shall file a certificate confirming the completion of this procedure. The notice to those who have terminated their tenancy shall be published at plaintiffs' expense and shall be published once each week for two successive weeks in the Roanoke Times & World-News. Plaintiffs' counsel shall file a certificate confirming the completion of this procedure.

ENTER:

James C. Turk

James C. Turk, Chief Judge

Entered by consent of

LEGAL AID SOCIETY OF
ROANOKE VALLEY
Counsel for Plaintiffs

By Henry L. Woodward
Henry L. Woodward

WOODS, ROGERS, MUSE, WALKER &
THORNTON
Counsel for defendant

By Thomas T. Lawson
Thomas T. Lawson

A TRUE COPY, TESTE:

Joyce F. Witt, Clerk

By: C. Hurd
Deputy Clerk

class or to be excluded from the class. Under the law, each class member has the right to be excluded from the class if he or she requests the court to exclude him. If you do not ask to be excluded, you will be included in any decision the court eventually makes whether that decision is favorable to the class or not. If you do not ask to be excluded, you may, if you wish, enter an appearance in this suit through your own lawyer on or before October 1, 1983.

If you desire to be excluded from the class, you must notify the court by letter or postcard postmarked no later than Oct. 1, 1983. The letter or postcard must clearly state your name and address and must simply state that you wish to be excluded from the class in the case of "Wright v. Housing Authority". The letter should be addressed as follows:

United States District Court For
the Western District of Virginia
P. O. Box 1234
Roanoke, Virginia 24006

THE SENDING OF THIS NOTICE IS NOT TO BE CONSTRUED AS AN EXPRESSION OF ANY OPINION BY THE COURT ON THE MERITS OF THE SUIT WITH RESPECT TO THE CLASS MEMBERS.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

BRENDA E. WRIGHT, et al., etc.,)
)
Plaintiffs)
)
v.) CONSENT ORDER ON CLASS NOTICE
)
CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY) Civil Action No. 82-908
)
Defendant)

On August 10, 1983, this Court certified this action as a class action and set out certain requirements for the notice to the class. These requirements included notification to the class members that they might seek exclusion from the class or enter an appearance through counsel by October 1, 1983. Counsel have advised the Court that they were unable to arrange for notice in time for class members to act by October 1 if they chose either of the foregoing options. Counsel have moved the Court for an order changing the deadline from October 1, 1983 to November 1, 1983, but otherwise reaffirming the provisions of the August 10 order. The Court finds that the relief sought is proper.

According, it is ORDERED that notice shall be given to the class in the forms attached to this order and that all other provisions of August 10, 1983, order of this Court are continued in effect.

ENTER:

James C. Turk, Chief Judge

A TRUE COPY, TESTE:
JOYCE F. WITT, CLERK
BY: ... DEPUTY CLERK

Entered by the consent of

THE LEGAL AID SOCIETY OF ROANOKE VALLEY
Counsel for Plaintiffs
By Henry L. Woodward
Henry L. Woodward

WOODS, ROGERS, MUSE, WALKER & THORNTON
Counsel for defendant
Thomas F. Lawson

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Roanoke Division

NOTICE

Certain persons have brought a suit against the City of Roanoke Redevelopment and Housing Authority. The persons who have brought this suit are referred to as the plaintiffs. The United States District Court has certified the action as a class action which means that the plaintiffs may represent not only themselves but also any person who is a member of the class which the court has defined. The court has defined the class as all tenants of Lansdowne Park, Lincoln Terrace, Hurt Park, Hunt Manor, Jamestown Place, Bluestone Park, and Indian Rock Village who have been, or will be during the course of litigation, surcharged for consumption of electric utility service in excess of allowances established by the City of Roanoke Redevelopment and Housing Authority. The class includes all those affected retroactively to January 7, 1981.

The plaintiffs are asking the court to do the following things:

1. Decide that the way the City of Roanoke Housing Authority determines and collects charges for the use of excess electricity is in violation of federal law and the tenants' leases;

2. Require the City of Roanoke Housing Authority to calculate in accordance with law all future charges for excess electricity use;

3. Require the City of Roanoke Housing Authority to refund to the members of the class any excess electricity charges it has collected from them.

The City of Redevelopment and Housing Authority denies that any surcharge in violation of the law has been collected and denies that any refund is owed to members of the class.

The purpose of this notice is to tell you about the lawsuit so that you can decide whether you wish to remain a member of the class or to be excluded from the class. Under the law, each class member has the right to be excluded from the class if he or she requests the court to exclude him. If you do not ask to be excluded, you will be included in any decision the court eventually makes whether that decision is favorable to the class or not. If you do not ask to be excluded, you may, if you wish, enter an appearance in this suit through your own lawyer on or before November 1, 1983.

If you desire to be excluded from the class, you must notify the court by letter or postcard postmarked no later than November 1, 1983. The letter or postcard must clearly state your name and address and must simply state that you wish to be excluded from the class in the case of "Wright v. Housing Authority". The letter should be addressed as follows:

United States District Court For
the Western District of Virginia
P. O. Box 1234
Roanoke, Virginia 24006

THE SENDING OF THIS NOTICE IS NOT TO BE CONSTRUED AS AN EXPRESSION OF ANY OPINION BY THE COURT ON THE MERITS OF THE SUIT WITH RESPECT TO THE CLASS MEMBERS.

42 U.S.C.

§1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

§1437a Rental payments; definitions

(a) Dwelling units assisted under this chapter shall be rented only to families who are lower income families at the time of their initial occupancy of such units. A family shall pay as rent for a dwelling unit assisted under this chapter the highest of the following amounts, rounded to the nearest dollar:

(1) 30 per centum of the family's monthly adjusted income... .

24 C.F.R.

§865.470 Purpose. (effective September 9, 1980)

The purpose of §§865.470 through 865.482 is to establish procedures to be used by PHAs in establishing and administering Allowances for PHA-Furnished Utilities and Allowances for Tenant-Purchased Utilities. Allowances for PHA-Furnished Utilities represent the maximum consumption units (e.g., kilowatt hours of electricity) which may be used by a dwelling unit without a surcharge for excess consumption against the tenant. Allowances for Tenant-Purchased Utilities represent fixed dollar amounts which are deducted from the Gross Rent otherwise chargeable to a tenant who pays the actual utility charges directly to the Utility suppliers whether they be more of [sic] less than the amounts of the Allowances.

§865.473 Establishment of allowances of PHAs. (effective September 9, 1980)

(a) Basic Requirement. PHAs shall establish (1) allowances for PHA-Furnished Utilities for all Checkmetered Utilities and (2) allowances for Tenant-Purchased Utilities for all Utilities purchased directly by tenants from the Utilities suppliers. These Allowances shall be incorporated into the PHA's rent schedules and shall be submitted for approval by the HUD field office, after compliance with requirements of notice to tenants prescribed under 24 CFR Part 861.

(b) Authorized Uses of Utilities on which Allowances Are Based. Allowances for both PHA-Furnished and Tenant-Purchased Utilities shall be designed to include Utility consumption requirements for major equipment furnished by the PHA (for example, heating furnace, hot water heater, range and refrigerator) and for minor items of equipment (such as toasters and can openers) furnished by the tenants. To avoid misunderstanding, the PHA shall include with the rent schedules a statement of the specific items of major equipment whose Utility consumption requirements were included in determining the amounts of the Allowances. This does not mean that tenants may not supply and use other items of major equipment, but if they do so the cost of any Utility consumption in excess of the applicable allowance will have to be borne by the tenant.

§865.477 Standards for allowances for PHA-furnished utilities. (effective September 9, 1980)

The Allowances for PHA-Furnished Utilities for each dwelling unit category and unit size shall be established in terms of consumption units, sufficient to meet the requirements of about 90% of the dwelling units in the category. Conversely the Allowances should be such as are likely to result in surcharges for about 10% of the dwelling units. The basic method of determining the Allowances should be as follows: